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CITATIONS

Cases—Continued.

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 993

NORRISTOWN BOX COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court below (R. 515–516) is reported in 124 F. (2d) 429. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 458–498) are reported in 32 N. L. R. B., No. 148.

JURISDICTION

The decree of the court below (R. 516–518) was entered on December 19, 1941. The petition for a writ of certiorari was filed on March 2, 1942. The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the Board's finding of domination of a labor organization and its order of disestablishment were proper in the absence of a showing that employees were actually intimidated by the employer's coercive acts.

2. Whether the fact that a labor organization is not structurally dependent upon the employer renders invalid the Board's finding of domination and its order of disestablishment.

3. Whether antiunion statements made by petitioner's officials and supervisors and a pamphlet circulated by petitioner which were found by the Board to constitute interference, coercion, and restraint are protected by the First Amendment to the Constitution.

4. Whether there is substantial evidence to support the Board's finding that petitioner discriminatorily discharged one of its employees in violation of the Act.

5. Whether an employer is justified in refusing to bargain with a union which in fact represents a majority of his employees because of a competing claim of majority made by a company-dominated labor organization.

6. Whether, assuming the Board's findings of unfair labor practices to be unsupported by substantial evidence, petitioner has been deprived of due process of law under the Fifth Amendment to the Constitution.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix to the petition at pages 65–70.

STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (R. 458–498). The facts, as found by the Board and as shown by the evidence, may be summarized as follows:[1]

When International Brotherhood of Pulp, Sulphite and Paper Mill Workers, Local 422, hereafter called the Union, began to organize petitioner's employees in September 1940, petitioner's president, Lysinger, and its secretary-treasurer and plant superintendent, Ray, summoned the principal employee organizer, Morris, and another employee to the office, and warned them unequivocally that "There is not going to be no union in here" (R. 463–464; 9–12, 292–293, 294–295).

[1] In the following statement the references preceding the semicolons are to the Board's findings, and the succeeding references are to the supporting evidence.

Thereafter Shop Foreman Lukens[2] questioned employees concerning their Union activities, intimated that abandonment of such activities would lead to a wage increase, and suggested the formation of an "inside" instead of an "outside" union (R. 464–465, 472–473; 126–127, 188, 245, 265–266, 341). Supervisor Pickell[2] likewise interrogated employees about the Union (R. 465; 249). On or about October 1, after President Lysinger and Secretary Ray had made repeated but unsuccessful attempts to persuade Morris to drop the Union, even going so far as to grant him a special wage increase for that purpose (R. 465–466; 15–19, 294),

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[2] Lukens was the foreman in charge of the entire second floor of petitioner's plant which has only two floors (R. 464; 117, 126, 265, 300), and was admittedly a supervisory employee for whose conduct petitioner is responsible (R. 464, 478; 341). The Board found also (R. 477), and petitioner does not now challenge the finding, that petitioner was responsible for the anti-union conduct of two other supervisors, Huston and Pickell, discussed, pp. 4–6. Huston was in general charge of the lower floor, and in direct charge of the cutting room where 10 or 12 employees worked under him to whom he assigned work and gave orders; he also had power to transfer employees to better paying jobs and to recommend discharge (R. 472; 12–14, 35, 72, 84, 91–94, 113–114, 115, 224, 303). Pickell was in charge of the wrapping department on the second floor; about 8 or 10 girls worked under his supervision (R. 465; 56–57, 111, 117, 249, 304–305, 328, 338). Both Huston and Pickell were regarded by the employees as their "foreman" or "boss" (R. 477; *ibid.*). Petitioner's responsibility for their anti-union activities is plain. *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584; *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514.

petitioner circulated among its employees a pamphlet entitled "Facts about the Wagner Act" (R. 466–467; 392–394, 22–23, 38, 69, 187, 244–245, 374). This pamphlet, while not inaccurate, placed exclusive emphasis upon the freedom of employees to join no union or an inside union, and thus contained, as the Board found, a "distorted and incomplete account of the rights of the employees under the Act with the intention of inviting formation of a company-dominated union and discouraging membership in the Union" (R. 471, 467–470). The Board found that petitioner's anti-union conduct preceding the circulation of the pamphlet violated Section 8 (1) of the Act (R. 471), and that, in the context of this conduct (R. 469, n. 9), the circulation of the pamphlet likewise violated Section 8 (1) (R. 468–469).

On October 6, as a result of the open hostility to the Union manifested by petitioner's officials and the suggestion of an inside union advanced by Foreman Lukens and in the pamphlet, an inside union, Norristown Box Company Employees Association (hereafter called the Association), was organized (R. 472–473). Supervisors lent assistance. Supervisor Huston (*supra,* p. 4, note 2) took part in the organization meeting and assured the employees present that an inside union was a "good idea" (R. 472; 46, 51–52, 72, 74–76, 84, 98–99); he and Supervisor Pickell (*supra,* p. 4, note 2) signed the Association's Articles and Bylaws (R. 473;

109–110, 111, 112, 453–454). The Association was permitted by petitioner openly to carry on solicitation and other activities during working hours (R. 473–474; 34–35, 190, 196, 252–257, 330–331, 333–334, 339). The Union was denied even-handed treatment with the Association. Association members were allowed to talk together while Union members were forbidden to do so (R. 476; 133–134, 226, 248, 250–251, 252–253). Supervisor Huston himself solicited for and advocated the Association and disparaged and cautioned against the Union (R. 475; 131–132, 103–108), and he and Foreman Lukens displayed unmistakable hostility to those who were members of the Union (R. 475–476; 14–15, 189–190, 225–226, 250, 329–330, 332–333). The Board found that petitioner, in order "to stifle the organization" of the Union, formed the Association and dominated, interfered with, and supported it in violation of Section 8 (1) and (2) of the Act (R. 478–479).

Despite petitioner's hostility, the Union by October 22 succeeded in enrolling a majority of the employees within the appropriate bargaining unit (R. 479–483).[3] When, however, the Union informed petitioner of its majority status and re-

[3] Petitioner does not challenge the Board's determination of the appropriate unit (R. 479–481). There were 69 employees in the unit (R. 480–481; 400–403, 341–342). The Union on October 22 represented 36 of the 69 employees (R. 481–482; 404–443, 145–146, 134–136, 217–222, 230–234, 262–

quested exclusive recognition, petitioner refused the request on the sole ground that a rival claim had been presented by the Association, and asserted that it would therefore require a Board certification prior to recognizing either group (R. 483–484; 377–378, 444–448). Throughout the ensuing strike called by the Union (R. 484, 486; 25–28, 166–167, 205–206),[4] petitioner adhered to its position that, in the absence of a Board certification, the Association's conflicting demands precluded recognition of the Union (R. 484–485; 208, 299–300). The Board found that petitioner refused to bargain with the Union "on the pretext that it was under an obligation to give consideration to the demands of the Association, the product of its own illegal conduct" (R. 487), and that by thus "pitting the company-dominated Association against the Union," petitioner had refused to bargain col-

263). While 3 of these 36 Union members joined the Association after they joined the Union and before October 22, the Board properly found (R. 482, 485) that such defections from the Union were irrelevant since the Association was company-dominated and the defections were thus the result of petitioner's unfair labor practices. *National Labor Relations Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318; *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72; *National Labor Relations Board* v. *P. Lorillard Co.*, No. 71, this Term; *Oughton* v. *National Labor Relations Board*, 118 F. (2d) 486, 494 (C. C. A. 3), certiorari denied, January 12, 1942, No. 98, this Term; *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548.

[4] The Board found that the strike was caused by petitioner's unfair labor practices (R. 487).

lectively with the Union in violation of Section 8 (1) and (5) of the Act (R. 485–486).

At the conclusion of the strike, petitioner agreed to reinstate the strikers on December 23 (R. 487; 168–172, 336–337, 395–397), but because Morris, the principal employee organizer of the Union (*supra*, p. 3), was suffering from a back injury, petitioner agreed that he could return to work whenever he was able to do so, upon one day's advance notice to petitioner (R. 488–489; 31, 171–172, 194–195, 246–247, 336–337, 456–457). When Morris, however, advised petitioner on January 9, 1941, that he was ready to return, petitioner refused to reinstate him, asserting that Morris had agreed to return to work on December 23 and had not lived up to his agreement (R. 489; 32–33). The Board found that this reason assigned by petitioner for Morris' rejection was clearly a pretext designed to eliminate the outstanding Union leader; it concluded that his discharge violated Section 8 (1) and (3) of the Act (R. 489).

The Board's order directed petitioner to cease and desist from its unfair labor practices, to disestablish the Association, to bargain collectively with the Union, to reinstate Morris with back pay, and to post appropriate notices (R. 496–498). On June 30, 1941, petitioner filed in the court below a petition to review and set aside the Board's order (R. 499–509); the Board answered requesting enforcement (R. 510–515). On December 1, 1941,

the court handed down a per curiam opinion (R. 515–516) and on December 19, 1941, entered a decree (R. 516–518) enforcing the Board's order in full.

ARGUMENT

1. Petitioner contends that the finding of domination and the disestablishment order with respect to the Association are improper (a) because there is no showing that the employees were actually coerced by petitioner's unfair labor practices (Pet. 3, 9, 10, 12, 15–16, 17–27, 47–48, 55–56, 61, 63); and (b) because the Association's constitution and bylaws do not render it structurally incapable of acting as a bargaining representative of employees (Pet. 9, 53–54, 61–62). Neither contention has merit.

(a) Petitioner's assertion that the employees were not affected by the coercive acts is contrary to the record. There is testimony that at least one employee was "really afraid" when interrogated by Foreman Lukens about the Union and thereafter refrained from joining the Union (R. 188); the Board found also that petitioner's unlawful conduct resulted in defections to the Association on the part of a number of Union members (R. 482, 485). In any event, a showing that employees were actually intimidated is unnecessary. *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 588; *National Labor Relations Board* v. *Automotive Maintenance Machinery Co.*, No. 188, this

Term, decided February 16, 1942;[5] *National Labor Relations Board* v. *Brown Paper Mill Co.*, 108 F. (2d) 867, 870–871 (C. C. A. 5), certiorari denied, 310 U. S. 651; *Bethlehem Steel Co.* v. *National Labor Relations Board*, 120 F. (2d) 641, 653 (App. D. C.); *Bethlehem Shipbuilding Corp.* v. *National Labor Relations Board*, 114 F. (2d) 930, 937 (C. C. A. 1).[6]

(b) Petitioner's claim that an organization must be structurally dependent upon the employer before it may be found dominated or ordered to be disestablished is contrary to a uniform line of authority in this Court and in the circuit courts of appeals upholding findings of domination and orders of disestablishment where the organization's structural validity was unquestioned. E. g., *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584; *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514;

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[5] In the *Automotive Maintenance* case, this Court rejected *sub silentio* the employer's contention that the finding of domination was improper because the "uncontradicted testimony of the employees" showed that they chose the inside union "freely and without coercion." Brief for the respondent, No. 188, this Term, p. 11.

[6] *Humble Oil Co.* v. *National Labor Relations Board*, 113 F. (2d) 85 (C. C. A. 5), and *National Labor Relations Board* v. *A. S. Abell Co.*, 97 F. (2d) 951 (C. C. A. 4), cited by petitioner as in conflict with the instant case (Pet., 12, 17–20, 27), turned upon their particular facts, and are clearly not in conflict.

Westinghouse Electric & Mfg. Co. v. *National Labor Relations Board,* 312 U. S. 660, affirming 112 F. (2d) 657 (C. C. A. 2). Cf. *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.,* 308 U. S. 241, 250–251.

2. Petitioner contends (Pet. 4, 9, 10–11, 13, 15, 16, 28–30, 45–49, 50, 63) that the anti-union statements of its officials and supervisors, including an officer's declaration that "there is not going to be no union in here" (Pet. 48, R. 11), and the distribution of the circular "Facts about the Wagner Act" (R. 392–394) constituted an exercise of the right of free speech and expression protected by the First Amendment. A like contention was made by the employer in *North Electric Mfg. Co.* v. *National Labor Relations Board,* No. 931, this Term, certiorari denied, March 16, 1942. As in that case, the validity of the contention here depends upon an issue of fact, i. e., whether the statements and circular may fairly be deemed to have constituted interference with, coercion, or restraint of the rights guaranteed to petitioner's employees by Section 7 of the Act. The right of free speech does not include the right to coerce employees, through speech or otherwise. *National Labor Relations Board* v. *Virginia Electric & Power Co.,* Nos. 25, 26, this Term, decided December 22, 1941. The unambiguous statements of petitioner's president, secretary-treasurer, and

supervisors' warning that the Union would not be tolerated in the plant, offering a wage increase in exchange for abandonment of the Union, suggesting the formation of an "inside" instead of an "outside" union, and disparaging and cautioning against the Union (*supra,* pp. 3–6) were coercive on their face and not mere expressions of opinion. So, too, petitioner's circulation of the pamphlet, considered in the light of the preceding anti-union conduct, constituted an invitation to form an inside union and interfered with employee rights of free choice. It is clear from the Board's decision (R. 469, n. 9) that, unlike the Board's finding with respect to the ambiguous bulletin involved in the *Virginia Electric* case, the Board's conclusion as to the coercive nature of the circular in the instant case was "based on the totality of the Company's activities during the period in question." *The Virginia Electric* case, *supra.*[7] Moreover, the Board's findings of violation of Section 8 (1), (2),

[7] In *National Labor Relations Board* v. *Auburn Foundry, Inc.*, 119 F. (2d) 331 (C. C. A. 7), cited by petitioner as in conflict with the instant case (Pet. 12, 28–30), the opinion shows that the court did not consider the pamphlet in the context of the employer's other anti-union conduct. Moreover, in that case the court enforced the Board's order because it was supported by other findings, and characterized its own remarks concerning the pamphlet as "somewhat incidental and not determinative of whether there is otherwise any substantial support for the order" (119 F. (2d) at 334).

(3), and (5) of the Act have adequate support apart from the distribution of the circular.

3. Petitioner attacks (Pet. 4, 7–8, 9, 10, 15–16, 32–35, 50, 63) the Board's finding that Morris, the principal employee organizer of the Union, was discriminatorily discharged, on the ground that there was no evidence impeaching the explanation of the employer that he was discharged for another reason. The contention is that, in the absence of direct impeaching testimony, the Board lacks power to draw an inference contrary to the employer's self-serving statement.

Petitioner's contention is that Ray (the company's secretary-treasurer) told Morris that he would be given employment, after an illness, if he gave the company one day's notice before December 23, 1940, and that he was discharged because he did not do so (Pet. 33). Three witnesses expressly stated, however, that Ray told them to inform Morris that he could return whenever he recovered upon giving one day's notice before his return (R. 194–195, 246–247, 336–337). Thus, even assuming petitioner's theory to be correct, petitioner cannot prevail because the employer's explanation was directly impeached. Hence, petitioner's claim of conflict (Pet. 13, 32–35) with *Nevada Consolidated Copper Corp.* v. *National Labor Relations Board,* 122 F. (2d) 587 (C. C. A. 10), pending argument, No. 774, this Term, and

National Labor Relations Board v. *Tex-O-Kan Flour Mills Co.*, 122 F. (2d) 433 (C. C. A. 5), is not supported. Moreover, for the reasons set forth in the Board's brief in the *Nevada Consolidated* case, No. 774, this Term, pp. 41–52, we believe those cases to have been incorrectly decided.

4. Equally without merit is petitioner's argument (Pet. 3, 9, 10, 13, 16, 36–41, 42–44, 50, 58–59, 62) that, in the absence of a Board certification, it was not required to recognize the Union because of the Association's competing claim to represent a majority of the men. Although an employer may, if he has genuine doubts, demand reasonable proof that the majority of the employees do favor an organization asserting the right to represent them,[8] he cannot base his refusal to bargain merely on the competing claim of an organization established as a result of his own unlawful conduct. Cf. *National Labor Relations Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318, 339–340; *Solvay Process Co.* v. *National Labor Relations Board*, 117 F. (2d) 83, 86 (C. C. A. 5),

[8] This was the situation in *Texarkana Bus Co.* v. *National Labor Relations Board*, 119 F. (2d) 480 (C. C. A. 8), which petitioner claims to be in conflict with the instant case (Pet. 13, 36–47). In that case there was no competing organization, but a refusal by the union seeking bargaining rights to comply with the employer's request that it offer reasonable proof that it represented the majority.

certiorari denied, 313 U. S. 596. Petitioner did not base its refusal to bargain on the ground that the Union had not presented proof of its majority status (R. 444–446, 377–378);[10] had its refusal been based upon the absence of such a showing, the Union would have had an opportunity to prove its claim. It is not here contended that the Union did not in fact represent a majority at that time, but only that the Association's claim made the situation so uncertain as to justify the petitioner in not recognizing the Union. In view of all the circumstances, including the support given the Association by petitioner and its opposition to the Union, the Board was clearly entitled to infer, as it did (R. 485, 487), that petitioner's advancement of the Association's rival claim and its insistence upon a Board certification was a pretext designed to avoid collective bargaining with the Union.

CONCLUSION

The decision below is correct and presents neither a conflict of decisions nor any question of

[10] If an employer refuses to bargain with a Union which in fact has majority status, he violates Section 8 (5) of the Act unless, having reason to doubt the Union's majority status, he requested the Union to furnish satisfactory proof thereof and the Union failed to do so. *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 869 (C. C. A. 2), certiorari denied, 304 U. S. 576; *National Labor Relations Board* v. *New Era Die Co.*, 118 F. (2d) 500, 504 (C. C. A. 3).

general importance. The petition should therefore be denied.

Respectfully submitted.

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